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In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

FUNCTIONAL MUSIC, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States and the Federal Communications Commission, prays that a writ of certiorari issue to review the judgment entered on November 7, 1958, by the Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 16–30) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (one judge dissenting) was entered on November 7, 1958 (App. A, *infra*, p. 30), and a petition for rehearing *en banc* was denied on January 15, 1959 by a five-to-four vote (App. B, *infra*, p. 31). On April 13, 1959, the time for

filing a petition for a writ of certiorari was extended by the Chief Justice to and including May 15, 1959. The jurisdiction of this Court is invoked under 5 U.S.C. 1040 and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the rules promulgated by the Federal Communications Commission requiring FM broadcast stations to transmit "background" and other "functional music" services to industrial and commercial subscribers on a subsidiary basis only, *i.e.*, separate from the main broadcast transmission to the public, are valid.

STATUTES AND RULES INVOLVED

The pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*, and of the rules of the Federal Communications Commission are set forth in Appendix C (*infra*, pp. 32–37).

STATEMENT

This petition seeks review of a judgment of the Court of Appeals invalidating rules of the Federal Communications Commission regulating the functional music operations of radio stations broadcasting in the frequency modulation (FM) band (App. C, *infra*, pp. 33–37).

Functional music services are transmitted to industrial and business subscribers by licensed radio stations over their assigned channels in the FM broadcast band. As presently conducted, they include (1) "background music" services for offices, factories, banks, etc. in which all spoken matter is deleted so that only background music is transmitted, and (2)

"storecasting" for retail stores, consisting of background music with selected advertisements and other announcements of particular interest to the subscribers.[1] Respondent supplies both services in the metropolitan Chicago area.

The "basic purpose" of all functional music operations is to provide "a pleasant but unobtrusive background music atmosphere in subscribers' places of business." (App. A, *infra*, p. 17, n. 1). It is advertised and sold as "work music" or "shoppers' music", "carefully planned and scientifically programmed" to "lessen fatigue, reduce boredom, relieve nervous tension and create congenial and more pleasant working conditions," thereby resulting in "reduced absenteeism, better labor relations, and increased production and office efficiency" (J.A. 28).[2] To accomplish this purpose, the music programmed is necessarily "devoid of striking or distracting qualities" and thus "avoid[s]" or "seldom use[s]" "extremes such as jazz or classical music" and vocals (J.A. 104 at n. 1).

In the "simplex" transmission system, universally used by functional music stations prior to the adoption of the Commission's functional music rules (and still used by respondent), the musical programming received by the public and by subscribers is usually identical (see J.A. 133). For subscribers, however, the station also emits a supersonic tone (the "beep")

[1] A third "functional music" service, apparently not used anywhere at present, is "transitcasting" which is substantially like "storecasting", but designed for transmission to public vehicles. Cf. *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451.

[2] "J.A." refers to the Joint Appendix in the Court of Appeals.

which does not affect conventional FM sets, but which, when received on the specially equipped sets furnished to subscribers by or through the station (see J.A. 25–26, 29, 75–76, 103), either cuts the sets off and on or steps up the volume, so that unwanted spoken matter is deleted (in the "background music service") or material of special interest to the subscriber is made louder (as in "storecasting") (J.A. 103–104). In all background music, and in many storecasting, transmissions, station and sponsor identification announcements, required by statute and Commission rules for all "broadcasting", are deleted (J.A. 38–39, 106, 164, 191–192).

Following extended rule-making proceedings, the Commission in March 1955 issued its Report and Order adopting the functional music rules (J.A. 131–159). On the basis of its findings as to the nature and purpose of functional music, the Commission concluded that the "key to the over-all operation" of stations engaged in functional music was the "service directed to the special points or subscribers," that functional music is not "primarily intended for reception by the general public" which receives it only "as an incidental by-product of the primary intent of the transmissions", and that the overall operation of such stations was, therefore, "predominantly non-broadcast in nature" (J.A. 133). Since the Commission did not contemplate conversion or reallocation of the FM broadcast band to non-broadcast uses, it could have ordered "cessation" of all functional music operations (J.A. 140). But considering FM stations' general need for

additional revenues (J.A. 110–111), and recent advances in the radio transmission art permitting such services to be continued without interfering with the station's broadcast functions, the Commission authorized, as the "only alternative" to "cessation" (J.A. 140), the transmission of functional music on a "multiplex" basis pursuant to special subsidiary authorizations.

Unlike "simplex", which allows the emission only of a single signal within the station's channel so that the same musical programming is transmitted both to subscribers and the general public, "multiplex" makes possible the simultaneous emission of two or more different signals within the same channel (see J.A. 141–142).[3] Under this system, the station may transmit functional music to its subscribers, and, at the same time, broadcast to the public a different program. The Commission found that "multiplex" is "feasible" for functional music operations, that it does not degrade the quality of the radio signals, and that multiplex equipment would shortly be available (J.A. 142–143). Because of delays in the manufacture of such equipment (J.A. 224, 229), the Commission several times postponed (ultimately to March 1958) mandatory multiplexing. By January 1958, when the Commission made the multiplex requirement final and effective except for brief additional extensions required to complete conversion to the new technique, 64 functional

[3] The term "channel" refers not to a single frequency, but to a band of frequencies assigned to an FM or television station. An FM channel is 200 kilocycles in width.

music stations had converted to or had adopted multiplex.[4]

In 1955, after the adoption of the functional music rules, the Commission renewed respondent's broadcast license (J.A. 210–211) and granted a temporary simplex authorization (J.A. 211–212) which was automatically extended as the rules' multiplexing requirement was postponed. On December 11, 1957, the Commission denied the motions of respondent and others to delete the multiplex requirement altogether or again postpone it (J.A. 243–248). In March 1958, the Commission refused to reconsider this ruling (J.A. 275–281). When respondent sought to "renew" its simplex authority (see J.A. 267), the Commission returned its application as being in conflict with the rules (J.A. 274–275).

On review,[5] the Court of Appeals noted that the rules "rest on the Commission's determination that

[4] At present, 107 stations operate on multiplex and 15 stations on simplex—the latter pursuant to court stays of the Commission rules.

[5] The court treated the Commission order of December 11, 1957, requiring respondent to multiplex, as appealable under Section 402(b)(5) which authorizes appeal "[b]y the holder of any * * * station license which has been modified * * * by the Commission". It dismissed respondent's companion petition to review the order. The court reasoned that the "validity" of the order was "entirely dependent upon the validity of" the functional music rules (App. A, *infra*, p. 24, n. 16), and that if they were "invalid", the multiplexing order against respondent, purportedly authorized by the rules, necessarily "impose[d] a modification" of its station license (p. 24) by compelling it "immediately to vary its broadcasting practice or face potential criminal sanctions for non-compliance" (*id.*, n. 16). Finding the rules to be "invalid", the court vacated the order and remanded the case to the Commission (p. 26).

* * * functional *programming* is not broadcasting" (App. A, *infra*, p. 24, emphasis added) but "point to point communications" (*ibid.*). Concluding that such "programming" "can be, and is, of interest to the general radio audience", the court held that the Commission's "finding" that it is not directed to and intended to be received by the public generally is "clearly erroneous" (p. 25), and that "such programming" possesses "the requisite attributes of broadcasting" (*ibid.*). It therefore held that the Commission's "action in barring functional music" was not "support[ed]" by the "reasons which the Commission relies upon" (p. 26).

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the power of the Federal Communications Commission to regulate, by rules of general applicability, the use of the frequency modulation (FM) broadcast band for functional music operations directed, not to the general public, but to particular paying subscribers, *e.g.*, stores, offices, factories. The Commission did not, as the Court of Appeals suggests (App. A, *infra*, p. 26), order functional music stations (which, like all FM stations, are licensed to engage only in "broadcasting") to discontinue these specialized services. Rather, after full administrative proceedings, the Commission promulgated rules authorizing such operations only on a subsidiary "multiplex" basis. This action, we submit, was clearly within the Commission's statutory authority and responsibility. The Court of Appeals' decision

setting aside these rules is clearly contrary to established principles respecting judicial review of agency action, and, if allowed to stand, will handicap the Commission in effectively regulating an important "new and rapidly developing field". *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203.

1. The "touchstone" of the Commission's rules (J.A. 132) is its conclusion that functional music transmissions are not "broadcasting" to the general public as defined by Section 3(o) of the Communications Act of 1934,[6] but are in the nature of point-to-point communications to paying commercial subscribers.[7] In setting aside this determination, the Court of Appeals improperly substituted its judgment on a matter which the statute leaves to the Commission. This Court has often held that the application to a particular fact situation of a definition such as "broadcasting", contained in an agency-administered regulatory statute, involves the agency's assessment of technical evidence in the light of its cumulative experience and knowledge of the field it regulates.[8] On such an issue, "[t]he 're-

[6] Section 3(o) defines "broadcasting" as the "dissemination of radio communications intended to be received by the public * * *."

[7] The Commission has consistently treated such specialized services as non-broadcast in character, and hence not authorized by a broadcast license. *Scroggin & Co. Bank*, 1 F.C.C. 194 (special advice to a class of listeners); *Bremer Broadcasting Co.*, 2 F.C.C. 79 (coded horse-race results); and *Adelaide L. Carrell*, 7 F.C.C. 219 (police broadcasts).

[8] *Gray* v. *Powell*, 314 U.S. 402, 411 (whether an exemption applicant is a coal "producer" under the relevant statute); *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (meaning of

viewing court's function is limited' " to finding "warrant in the record" and a "reasonable basis in law" for the "Commission's interpretation." *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153.

The Court of Appeals, focusing exclusively on the musical "programming" available under the simplex mode of operation to the general public as well as the functional music subscribers, ignored the crucial problem of the nature and intent of the functional music service as such. It felt that because the music used on functional programming "can be, and is, of interest to the *general* radio audience", and the respondent received revenues from advertisers "specifically desiring to reach that audience" (App. A, *infra*, p. 25), "a finding that the programming * * * is not directed to, and intended to be received by, the public generally is clearly erroneous" (*ibid.*). The Commission, however, made no such finding. It expressly recognized that "the functional music operator has no objection to and indeed, probably desires the reception by the general public of his transmissions, in addition to the special places primarily involved." (J.A. 109, 133). Its conclusion was not that an FM station engaged in simplex functional music opera-

"employee" under National Labor Relations Act); *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504 (whether a death arose "out of and in the course of employment"); *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143 (meaning of "labor dispute"); *United States* v. *Louisville & Nash. R.R.*, 235 U.S. 314 (existence of "undue and unreasonable preference" under Interstate Commerce Act); *Board of Governors* v. *Agnew*, 329 U.S. 441, 449–451 (concurring opinion of Justices Rutledge and Frankfurter).

tions was not broadcasting to the public, but that such transmissions to the public were *incidental* to the main purpose of the station, that "the service directed to the special points or subscribers would clearly appear to be the key to the *overall* operation" (emphasis added), and "[f]or this reason we believe the operation must be described as *predominantly* non-broadcast in nature" (J.A. 109, 133; emphasis added). The decision of the Court of Appeals thus rejected a "finding" which the Commission did not make. Of course, the music broadcast on a simplex operation could be heard by the general public too, but the point of the Commission's finding was that an FM station whose operations are devoted to these functional music transmissions is rendering a *service* which differs markedly from the "broadcasting" service defined by Section 3(o) as "intended to be received by the public."[9]

The facts of record fully sustain the Commission's determination that the functional music services provided to the subscribers, as distinguished from the programming received by the home public, are not "broadcasting." By respondent's own statements (J.A. 25–28), they are offered to subscribers as a lower-priced substitute for "Muzak" (a background music service employing telephone wires) which "concededly provide[s] an industrial point-to-point service" (J.A. 133). It is advertised and sold as a service tailored

[9] The court found it unnecessary to "resolve the much contested question of whether or not customers in subscribers' places of business constitute the 'public', for purposes of § 3(o)" (App. A, *infra*, p. 25, n. 18).

to the particular and specific needs of industrial, commercial, and other like institutions (see Statement, *supra*, pp. 3–4).

The distinctive program format, never adopted by stations prior to the "advent of the [functional music] services" (J.A. 133), also demonstrates its character as a specialized industry service. This format is determined by subscribers' requirements (see J.A. 92–96, 106), and subscriber payments are the principal revenue source of such stations (see J.A. 133). The non-broadcast character of functional music also appears from the necessary practice of deleting from the transmissions to subscribers the station and sponsor identification announcements required in all "broadcasting" operations by Section 317 of the Communications Act and by Commission rules (47 C.F.R. 3.287, 3.289, App. C, *infra*, p. 33).

Finally, the non-broadcast character of functional music is perhaps most clearly revealed by the station's transmission of a special supersonic control signal (the "beep"). This signal can be received only on a subscriber's specially equipped receiver, and is designed for the express purpose of insuring that the functional music service will be different from that receivable on conventional home-owned FM sets.[10] As the Court of Appeals recognized, it is for the emission of the "beeps" (which are indispensable to functional music operations as presently conducted) that "subscribers are

[10] If the functional music service could be received on a conventional FM set, the functional music operator would have nothing to sell to the subscribers.

willing to pay the subscription fee" (App. A, *infra*, p. 17). In this way, the station can carve out of its basic program format various specialized services which are really distinct from each other and from the station's public broadcast (J.A. 172–173, 175–179, 214–215). Clearly, a service built around a non-broadcast transmission such as the "beep" is itself non-broadcast in nature.

2. The status of functional music operations is one of substantial and continuing administrative concern. In recent years, many stations have turned to such operations to supplement low earnings from broadcasting (see J.A. 110–111), and, at present, about 17% of all FM licensees hold special Commission authorizations for that purpose. The economic pressures to expand specialized non-broadcast services still exist and are likely to continue. Since January 1958, the percentage increase of functional music authorizations has significantly exceeded the corresponding figure for all FM broadcast licenses.[11]

The effect of the Court of Appeals decision invalidating the functional music rules is to deprive the Commission of power effectively to regulate these new and widespread activities of FM stations.[12] Since, under the court's decision, functional music consti-

[11] During that period, functional music authorizations rose by 25.78% (from 94 (64 multiplex and 30 simplex) to 122 (15 simplex and 107 multiplex)), while total FM broadcast authorizations increased by only 22.88% (from 590 to 725 authorizations).

[12] While the court left open the question whether functional music could be "barred as objectionable" on grounds other than its non-broadcast status (App. A, *infra*, p. 26), there are in fact no other effective means for regulating such services so as to permit their existence while precluding their domi-

tutes "broadcasting", an FM broadcast license necessarily authorizes a station to engage in such operations without further Commission action, and in fact one FM station has already done so without seeking special authority.

Without the rules' mandatory multiplexing provision, it is unlikely that many of the present simplex operators (including respondent) now operating under court stays will voluntarily convert to multiplex, and, in fact, it is highly likely that many newly entering the field will adopt the simplex system. This is because multiplex equipment is more costly than simplex, and multiplex signals may not, in some circumstances, carry as far. Thus, if the court's decision stands, both existing and future simplex operators will have a substantial competitive advantage over the large number of multiplex operators who, since adoption of the rules in 1955, have converted to multiplex in good faith reliance upon the validity

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nance of the FM band. No other legal basis has been suggested for rules requiring that functional music operations be carried on only on a subsidiary basis if they are in fact "broadcasting". And while, conceivably, individual licensing or renewal proceedings might result in conclusions that individual functional music operations by the simplex technique were not in the public interest—thus requiring their abandonment or resort to voluntary multiplexing—such a case-by-case method of regulating an important industry is obviously unsatisfactory. See *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202-203. Not only would these individual proceedings be protracted but they would not involve the real issue (*i.e.*, the non-broadcast nature of the operation) but derivative issues such as abdication of control, or the need for the programming format in the particular community, which might well vary from case to case.

of the rules. In short, the development of an important segment of the broadcast spectrum has been left, by the decision below, in confusion and uncertainty.

The case is also important from the standpoint of the public interest in preserving valuable FM spectrum space for broadcasting designed to serve all of the public's multiple interests rather than use for specialized services created for special groups. The FM band, which permits exceptionally high quality reproduction, at present affords the principal space available for new radio broadcast operations, since the older AM band has reached a point at which the service areas of individual stations are increasingly limited. In its Notice of Proposed Rulemaking, the Commission emphasized the rising interest in FM, notably in "smaller communities," the growing number of "good music" FM broadcasts, the "moderate but steady growth in the number of non-commercial educational FM stations," and the use of FM channels by financially vigorous AM stations to extend their coverage (J.A. 110). Available space for such desirable uses will be seriously diminished if specialized services like functional music are free indiscriminately to occupy and dominate the use of frequencies in the FM band.

By treating functional music operations as a subsidiary non-broadcast specialized service not subject to the provisions applicable to broadcasting and separated from the broadcast transmission by multiplexed signals, the Commission was able to protect the public interest and at the same time to afford FM stations a continuing source of urgently needed rev-

enues. In so doing, the Commission emphasized that it was not reallocating the FM band among the various claimants for additional radio frequencies, but was assigning a specialized service to a subsidiary position in order to preserve the FM band for broadcasting (J.A. 134–135, 140–141, 187, 194, 245). In effect, the court's decision does what the Commission refused to do and permits the reallocation of the FM band to specialized non-broadcast services of the nature here involved. The court below has substituted its judgment for that of the Commission on an important matter of administrative regulation, one which Congress has left to the responsible agency concerned and not to the reviewing court.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 14374

FUNCTIONAL MUSIC, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

No. 14375

FUNCTIONAL MUSIC, INC., PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

APPEAL FROM AND PETITION FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

Decided November 7, 1958

Before EDGERTON, BAZELON and DANAHER, *Circuit Judges*

BAZELON, *Circuit Judge:* Functional Music, Inc., seeks judicial review of rules promulgated by the Federal Communications Commission in 1955, which rules restrict the practices of FM licensees furnishing a radio music service on a subscription basis. In doubt as to whether review was authorized by § 402(a) or by § 402(b) of the Federal Communications Act, Functional initiated review proceedings under each provision as a precautionary measure.

Petitioner-appellant is the licensee of FM broadcasting station WFMF, Chicago. Since 1949 it has restricted its program format predominantly to background music. Additionally, it has superimposed upon traditional broadcasting services, a subscription music operation.[1] Subscribers, typified by restraurants, stores, schools and comparable institutions, receive petitioner's regularly scheduled broadcasts, but with all advertising matter received by the ordinary listener deleted. To effect this deletion, petitioner, immediately before and immediately after the broadcast of any advertising matter, transmits a supersonic signal which activates special equipment installed in subscribers' receivers to cut off and afterwards re-connect the broadcast signal. It is purportedly for the emission by petitioner of this inaudible signal that subscribers are willing to pay the subscription fee. Revenue resulting from the subscription service has, in fact, formed the major portion of petitioner's income. Petitioner, however, also receives substantial revenue from sale of time to advertisers for spot announcements. And among the general Chicago radio audience, WFMF has been highly popular.[2]

In 1950 the Commission, for the purpose of formulating a policy to govern "functional programming," commenced a study of the practices of broadcasters engaging in FM subscription services. Particular interest was manifest in the factor of program control

[1] Among the broadcasters engaging in such a service, and the subscribers receiving it, this service is variously termed "functional music," "background music," "planned music" and "storecasting." Whatever the name, the basic purpose is to provide a pleasant but unobtrusive background music atmosphere in subscribers' places of business.

[2] Surveys conducted in 1955 show WFMF, during the evening hours, to be the most popular FM-only station, and the fifth most popular of all stations, in the Chicago area.

by the subscribing party, since the Commission feared that background music programming, which is highly specialized and directly adaptable to subscribers' needs, was formulated in their interest rather than that of the general public. On December 31, 1953, the Commission released a notice of proposed rule making which suggested that functional music operations did not constitute broadcasting as defined by § 3(o) of the Communications Act.[3]. From this suggestion, the Commission concluded that functional programming was not properly transmittable by a station licensed to provide a broadcasting service. The Commission did not propose, however, discontinuance of the subscription service altogether; it recognized that the resulting revenue was vital to growth of the infant FM industry. Rather, it proposed that functional programming be relegated to a basis subsidiary to the regular broadcasting commitment by emission as a secondary signal on a multiplexed transmission system—a recently devised electronic system allowing transmission of multiple signals upon a standard allocated FM channel.[4]

After conducting hearings, the Commission in 1955 established rules which in substance adopted the

[3] "'Broadcasting' means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 48 STAT. 1065 (1934), 47 U.S.C. § 153(o) (1952).

[4] Theretofore, FM communications had been transmitted on a so-called "simplex" basis, with each allocated FM channel supporting but one FM signal. Licensee engaging in a functional music service emitted a single signal capable of reaching both subscribers and the listening public: special receiving equipment in the subscribers' place of business was used to tailor this signal to their peculiar needs.

changes proposed in 1955.[5] The compulsory multiplexing requirement was postponed for a one-year period, however, due to a general unavailability of the requisite multiplexing equipment. From time to time, the multiplexing requirement was additionally postponed for like reason. In late 1957, shortly before the expiration of the most recent grace period, Functional Music petitioned the Commission to eliminate the multiplexing requirement altogether, or, in the alternative, to allow an additional blanket postponement of the multiplexing rules. On December 11, 1957, this petition was denied.[6] From the Commis-

[5] The Commission determined that functional music operations were non-broadcasting in nature. It established a 36-hour per week, 5-hour per day, minimum broadcasting commitment, prescribing this as a period during which FM licensees operating on a simplex basis could conduct only broadcasting services. Additionally, the Commission created a Subsidiary Communcations Authorization—SCA—tied to and directly dependent upon the existence of an FM broadcasting license; the SCA authorized FM licensees to engage in a limited type of non-broadcasting activities—functional music programming. Such non-broadcasting activities could be conducted at any time if the licensee operated on a multiplexed transmission system. If the licensee operated on a simplex basis, however, functional programming was authorized only when the licensee was not fulfilling its 36-hour per week broadcasting commitment. SCA's on a simplex basis were to be available only during the one-year period following the effective date of the rules.

[6] Petitioning for amendment of the rules to expunge altogether the multiplexing requirement, Functional asserted that the Commission's recent authorization of subscription television services on frequencies regularly assigned to television broadcasting had undercut the legal foundation for the restrictions placed on FM subscription operations. Functional sought to justify its alternative request, that the mandatory multiplexing requirement be postponed for an additional year, on the basis of continuing technical difficulties remaining in a multiplex

sion's refusal in March of 1958 to reconsider its decision of December 11, petitioner timely sought judicial review here, alleging the invalidity of the 1955 rules and hence the invalidity of the 1958 order implementing those rules.

While the parties have not specifically put in question our jurisdiction to examine the validity of the 1955 rules in these proceedings, jurisdiction is, of course, always a threshold consideration.

The rules here attacked were initially promulgated in 1955. It very well may be that they were then sufficiently final to support judicial review.[7] No such review had been sought, however. And as to those rules, the statutory period specified for review of, or appeal from, Commission orders and decisions has now long since passed.[8] Nevertheless, we are persuaded

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system, and continuing unavailability of adequate multiplexing equipment.

Without discussion, the Commission adhered to its earlier conclusion that an FM functional music service was not broadcasting. Arguing that two and a half years had elapsed since announcement of a multiplex requirement, that multiplexing was a feasible communication system, and that sufficient multiplexing equipment was then available to fill the needs of functional broadcasters, the Commission denied a blanket postponement of the multiplexing requirement. It recognized, however, that an immediate simplex termination might be unduly harsh as to licensees then in the throws of converting their simplex equipment to multiplex equipment. The Commission therefore provided for individual short-term waivers of the multiplexing rules for FM broadcasters then engaged in equipment conversion. To afford the Commission sufficient time to process applications for such a waiver, permissible simplexing was extended for a two-month period.

[7] See, *e.g.*, *Columbia Broadcasting Co. v. United States*, 316 U.S. 407 (1941).

[8] Judicial review of action of the Federal Communications Commission is provided for by the terms of §§ 402(a) and (b) of the Communications Act, 48 Stat. 926 and 1093 (1934), as

that judicial examination is now permissible.[9] As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity. And see *Columbia Broadcasting Co.* v. *United States*, 316 U.S. 407, 421

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amended, 47 U.S.C. §§ 402(a) and (b) (1952). See note 10 *infra*. Section 402(a), incorporating by reference the provisions of Chapter 19A, Title 5, 64 Stat. 1129–32 (1950), 5 U.S.C. §§ 1031–42 (1952), specifies that review of orders contemplated by that section may be sought within sixty days of the time at which such orders become final. Section 402(b) establishes a thirty-day period during which designated orders and decisions of the Commission may be appealed.

[9] Functional's accession to the Commission rules, and to the underlying basis for those rules, during the considerable period between the original rule-making proceeding and the 1957 application for amendment of the rules does not estop it from contesting here the validity of those rules. During that period, Functional conformed its programming to adhere to the 36-hour per week minimum broadcasting commitment; in its repeated requests for postponement of the multiplexing requirement, it alleged use of best efforts to convert to a multiplexing system. However, conforming to the dictates of invalid administrative action does not estop a party from subsequently contesting that very action. *California-Oregon Power Co.* v. *Federal Power Comm'n*, 99 U.S. App. D.C. 263, 239 F. 2d 426 (1956); *Standard Airlines* v. *Civil Aeronautics Board*, 85 U.S. App. D.C. 29, 177 F. 2d 18 (1949); *Peoples Bank* v. *Eccles*, 82 U.S. App. D.C. 126, 161 F. 2d 636 (1947), *reversed on other grounds*, 333 U.S. 426 (1948).

(1941), for example, where the Supreme Court clearly contemplated the continuing availability of review of Communications Commission rules and regulations.

Sections 402(a) and 402(b) of the Communications Act, under which these review proceedings have been initiated, are by definition mutually exclusive.[10] The proper delineation of these two provisions has been a source of considerable difficulty to litigants in the

[10] "(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5. 48 Stat. 926 (1934), as amended, 47 U.S.C. § 402(a) (1952).

"(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia * * *" by, *inter alia*, an applicant for a construction permit or station license, or by an applicant for a renewal, modification, transfer, or assignment of such an instrument, whose application has been denied; by any party aggrieved by an order granting or denying such an application; or by the holder of a construction permit or station license whose authorization has been revoked, modified, or suspended by the Commission.

The orders reviewable under each of the two provisions are not intrinsically different: *Scripps-Howard Radio Co.* v. *Federal Communications Comm'n*, 316 U.S. 4, 8 (1941). The orders encompassed by § 402(b) directly affect the radio-licensing function of the Commission, and in the interest of uniformity, appeal therefrom is concentrated in the Court of Appeals for the District of Columbia Circuit. All other Commission orders may be reviewed alternatively in the Court of Appeals for the Circuit where the party resides or has its principal office, or in the Court of Appeals for the District of Columbia Circuit. 64 Stat. 1130 (1950), 5 U.S.C. § 1033 (1952). A statutory revision in 1952 broadened the class of orders included within § 402(b). H.R. Rep. No. 1750, 82d Cong., 2d Sess. 16 (1952); S. Rep. No. 42, 82d Cong., 1st Sess. 11 (1951).

past.[11] Functional argues that the Commission's 1958 decision, affirming the December 11, 1957, order to multiplex, effected a modification of its broadcasting license and therefore that appeal will lie under § 402(b).[12] Paradoxically, determination of this question is dependent upon resolution of the merits of the appeal,[13] For whether or not a modification occurred as a result of the 1958 order depends upon the validity of the rules. If the 1955 rules were valid, the license was modified in that year; petitioner's license was renewed subsequent to promulgation of the rules, and a licensee takes his license subject to all valid outstanding rules and regulations.[14] On the other hand, if the rules were invalid, they are a nullity and there-

[11] See, *e.g.*, *Metropolitan Television Co.* v. *United States*, 95 U.S. App. D.C. 326, 221 F. 2d 879 (1955); *Columbia Broadcasting System* v. *Federal Communications Comm'n*, 93 U.S. App. D.C. 399, 211 F. 2d 644 (1954).

[12] In its petition for rehearing of the Commission's order and report of December 11, 1957, Functional alleged that the mandatory multiplexing resulting from that order effected a modification of its existing station license, and demanded the hearing required by § 316(a) of the Communications Act, 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 316(a) (1952). That section authorizes the Commission to modify any existent construction permit or station license, but also entitles the holder of such an instrument to a public hearing on "why such order of modification should not issue * * *." This hearing was refused by the Commission, which has alleged that no modification occurred as a result of that order.

[13] For a prior example of use of a "jurisdiction to determine jurisdiction" approach in deciding upon the applicability of statutory review provisions, see *Music Broadcasting Co.* v. *Federal Communications Comm'n*, 95 U.S. App. D.C. 12, 217 F. 2d 339 (1954).

[14] See, *e.g.*, *Columbia Broadcasting Co.* v. *United States*, 316 U.S. 407, 418 (1941); *Chapman* v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 629 (1950); *Illinois Steel Co.* v. *Baltimore & O. R.*, 320 U.S. 508, 511 (1942).

fore incapable of effecting a modification of the license.[15] In that event it is the 1958 order, requiring petitioner, and those broadcasters similarly situated, to multiplex or discontinue functional programming, which imposes a modification and which therefore may be appealed from under § 402(b)(5).[16]

Consequently, we proceed to an examination of the 1955 rules. Those rules, restricting the operation of a subscription music service by FM licensees, rest on the Commission's determination that such functional programming is not broadcasting within the meaning of § 3(o) of the Communications Act. According to the Commission, various practices of functional broadcasters, namely, presentation of a highly specialized program format, deletion of advertising from subscribers' receivers, and exaction of a charge for these services, dictated a finding that functional music operations constitute point-to-point communications. And in its brief, the Commission sought to illustrate this conclusion by likening petitioner's functional music service to other services held to be point-to-point communications. In *Bremer Broadcasting Co.*, 2 F.C.C. 79 (1935), for example, transmission of coded horse-race results was held to be a service not covered by a license to broadcast. And similar treatment was accorded messages transmitted for a local police department (*Adelaide Lillian Carrell, et al.*, 7 F.C.C.

[15] *E.g.*, *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129 (1935). And see note 9 *supra*.

[16] The 1958 order required petitioner immediately to vary its broadcasting practice or face potential criminal sanctions for non-compliance, 48 Stat. 1100 (1934), as amended, 47 U.S.C. § 501 (1952 Supp. V). Therefore, the 1958 order had an immediate impact on petitioner, even though the validity of the order is entirely dependent upon the validity of the 1955 rules. *Varney* v. *Waneheime*, 147 F. 2d 238, 243 (6th Cir. 1945). *Cf. Columbia Broadcasting Co.* v. *United States*, *supra*.

219 (1939)), and programs furnishing spiritual, vocational, and marital advice to specified listeners (*Scroggin & Company Bank*, 1 F.C.C. 194 (1935)).

However, the practices pointed to by the Commission do not form a basis for concluding that functional operations are non-broadcasting in nature. Nor do we believe that the cases cited in the brief are in point. For the Communications Act specifies that broadcasting is "the dissemination of radio communications intended to be received by the public * * *"[17] And program specialization and/or control is not necessarily determinative of this requisite intent, and therefore dispositive of broadcasting status, as the Commission assumed. Broadcasting remains broadcasting even though a segment of those capable of receiving the broadcast signal are equipped to delete a portion of that signal. In contrast to the objectionable service in the cited cases, which by its very nature negates an intent for *public* distribution, functional programming can be, and is, of interest to the *general* radio audience. Petitioner, for example, has acquired a high degree of popularity with the Chicago free listening audience. Moreover, it receives substantial and growing revenues from advertisers specifically desiring to reach that audience. In this light, a finding that the programming of petitioner and broadcasters comparably situated is not directed to, and intended to be received by, the public generally is clearly erroneous. Transmitted with the intent contemplated by § 3(o), such programming therefore has the requisite attributes of broadcasting.[18]

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[17] Section 3(o), 48 Stat. 1065 (1934), 47 U.S.C. § 153(o) (1952).

[18] If the view which we take of this case, it is unnecessary to resolve the much contested question of whether or not customers in subscribers' places of business constitute the "public" for purposes of § 3(o).

Whether or not petitioner's functional music service may be barred as objectionable for reasons other than its supposed status as a non-broadcasting service is not before us. We merely conclude that the reasons which the Commission relies upon do not support its action in barring functional music. *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194 (1947). The petition for review in No. 14375, brought under § 402(a), is accordingly dismissed. In No. 14374, brought under § 402(b), the order of the Commission is vacated and the case is remanded for such further action as the Commission is advised to take in light of this decision.

So ordered.

DANAHER, *Circuit Judge, dissenting:* The Commission had distributed FM radio frequencies pursuant to an allocation plan as distinguished from AM frequencies granted in response to specific applications. *Logansport Broadcasting Corp.* v. *United States*, 93 U.S. App. D.C. 342, 345, 210 F. 2d 24, 27 (1954). It has been seeking to allocate FM channels in the public interest so as to achieve a more effective use of the frequency space assigned for FM broadcasting. The Commission recognized, however, that FM had fallen short of development of a sound economic base.

Various licensees, including WFMF, prior to rule-making, had undertaken by means of simplex transmission to exploit a functional music operation in an endeavor to compete in the general radio advertising market. The Commission inaugurated studies of developments in this field which culminated, after a period of years, with the issuance on December 31, 1953 of a notice of proposed rule-making. The Commission emphasized that the FM broadcast band was not to be converted to some new specialized non-

broadcast service or services. On the contrary, the Commission decided to grant special communications authorizations only to permit a subsidiary service as an adjunct to the main undertaking, namely, use of the already allocated FM frequency to accomplish an FM broadcast service to the public.

In the notice of proposed rule-making with regard to functional music, the Commission specifically invited comments directed toward its tentative conclusion that functional music was not "broadcasting." WFMF, with other FM licensees who had already been experimenting with functional music operations, submitted comment, and after the Commission on March 22, 1955 had issued its report and order, they filed petitions for reconsideration. They argued then that functional music services were broadcasting. The petitions for reconsideration, including that of Station WFMF, were denied, and neither the licensee of WFMF nor any other licensee appealed, either from the Commission's report and order adopting the new rules or from the orders denying the petitions for reconsideration.

Clearly, then, when petitioner's FM license had expired and thereafter was renewed in 1955, it was taken subject to the Commission's determination that functional music operations would be authorized only pursuant to an SCA, secondary in nature and deemed to have no status whatever apart from the FM license. WFMF and the entire industry were on notice that the Commission would authorize only "multiplex" transmission by which there might be simultaneous transmission of two or more signals within a single channel. The Commission made it abundantly clear that an FM broadcast band, already allocated to a particular area in the public interest, was not to be converted in large degree to commercial

or industrial operations where the subscribers, and not the public, would control the receiving sets, decide when they should operate, at what volume, and what portions of what programs were to be deleted. In short, the Commission decided as a matter of policy, that FM bands were to be used for the purpose for which they had been allocated, and that functional music operations might be authorized on those FM bands only in a manner subsidiary to the main broadcasting service from which the licensee was to draw its financial sustenance. Its policy was evolved in the public interest, and was designed to achieve a far more effective use of the allocated FM frequencies, with greater opportunity to more licensees to achive economically feasible FM broadcasting. The Commission's findings do not lack substantial support in the record. Various petitioners already in the simplex field were granted extensions of the period within which they were to convert from simplex to multiplex transmission. Each licensee, including WFMF, at the time it filed its application for renewal was bound by the provisions of 47 U.S.C. § 301, and particularly in accordance with § 304, must have waived any claim to the use of any "particular frequency or of the other as against the regulatory power of the United States because of previous use of the same, whether by license or otherwise."

Thus, the earlier permitted use of simplex conferred no right upon WFMF, nor was its FM license modified when, later, the period of permitted use of simplex was terminated. Rather, the petitioner was bound to conform to the terms of the FM allocation for which it had applied and to which it had agreed. In sum, our petitioner possessed thereafter no vested right to 900 subscribers or any other number. It had no vested right to a 50 to 60 mile coverage by simplex

as distinguished from half that distance by multiplex. It had no vested right to freedom from competition. The Commission well may expect that areas including present WFMF subscribers who may not through multiplex be served by this petitioner, will receive service from some other FM licensee which may undertake FM broadcasting in the area if assured of a measure of financial support. In any event the use of FM frequencies for broadcasting and not for special subscription services is the objective, and we should not say it is not a proper one.

From the present record, we were shown that there now are 96 subsidiary communications authorizations outstanding for functional music by FM broadcast stations. Of these, 59 pursuant to the rule, are engaged in multiplex transmission. In areas where feasible and where suitable equipment is or will become available, the Commission, no doubt, is justified in expecting other FM stations will convert to bring themselves in conformity with the 1955 rule, as the 59 have already done.

As noted, the Commission's functional music rules were adopted after protracted rule-making proceedings in which all parties, including WFMF, had ample opportunity to present their views. In my judgment the Commission is commanded by the Act to accomplish the objectives it sought here to achieve. The Commission simply decided that the specialized simplex service was not to be permitted to pre-empt the valuable spectrum space allocated to FM frequencies intended to be devoted to broadcasting. This was a public interest determination required to be made by law. Thus the Commission's rule-making was entirely within the Commission's competence.

"The Communications Act must be read as a whole and with appreciation of the responsibilities of the

body charged with its fair and efficient operation. The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions." *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956); cf. *Federal Comm'n* v. *Broadcasting Co.*, 309 U.S. 134, 144–46 (1940); *Communications Comm'n* v. *WJR*, 337 U. S. 265 (1949).

I think we are bound to affirm the Commission's action.

Judgment

These cases came on to be heard on the record from the Federal Communications Commission, and were argued by counsel.

On consideration whereof, it is ORDERED and ADJUDGED by this court that the order of the Federal Communications Commission on appeal in case No. 14,374 is vacated, and that this case is remanded to the said Federal Communications Commission for further proceedings consistent with the opinion of this court.

It is FURTHER ORDERED and ADJUDGED by this court that the petition for review in case No. 14,375 is dismissed.

Per Circuit Judge Bazelon.

Dated November 7, 1958.

Separate dissenting opinion by Circuit Judge Danaher.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

No. 14374, September Term, 1958

FUNCTIONAL MUSIC, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

No. 14375

FUNCTIONAL MUSIC, INC., PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Before: PRETTYMAN, *Chief Judge*, EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges, in Chambers.*

Order

Upon consideration of respondents' petition for a rehearing in banc, it is

Ordered by the court that the petition for rehearing in banc is denied.

PER CURIAM.

Dated January 15, 1959.

Circuit Judges Miller, Danaher, Bastian and Burger would grant the petition.

APPENDIX C

The Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*, provides in pertinent part:

SECTION 3. For the purposes of this chapter, unless the context otherwise requires—

* * * * *

(o) "Broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

* * * * *

[47 U.S.C. 153(o)]

SECTION 317. All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person. [47 U.S.C. 317]

SECTION 402. (a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5.

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

* * * * *

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

* * * * *

[47 U.S.C. 402]

The rules of the Federal Communications Commission, 47 C.F.R., provide in pertinent part:

> § 3.287 *Station identification.* (a) A licensee of an FM broadcast station shall make separate station identification announcement (call letters and location) for such station: * * *. Station identification announcement shall be made at the beginning and ending of each time of operation and during operation (1) on the hour and (2) either on the half hour or at the quarter hour following the hour and at the quarter hour preceding the next hour: * * *.
>
> * * * * *
>
> § 3.289 *Sponsored programs; announcement of.* (a) In the case of each program for the broadcasting of which money, services, or other valuable consideration is either directly or indirectly paid or promised to, or charged or received by, any radio broadcast station, the station broadcasting such program shall make, or cause to be made, an appropriate announcement that the program is sponsored, paid for, or furnished either in whole or in part.
>
> * * * * *

The rules of the Federal Communications Commission, 47 C.F.R., respecting the transmission of functional music are as follows:

> SEC. 2.1 *Definitions.* * * *
>
> * * * * *
>
> *FM Broadcasting station (BCF).* A broadcasting station utilizing telephony by means of frequency modulation, and when authorized under a Subsidiary Communications Authorization (SCA), utilizing F9 emissions.
>
> * * * * *
>
> SEC. 3.261. *Time of operation.* All FM broadcast stations will be licensed for unlimited time operation. A minimum of 36 hours per week during the hours of 6:00 a.m. to midnight,

consisting of not less than 5 hours in any one day, except Sunday, must be devoted to the FM broadcast operation; time devoted to operations conducted pursuant to a Subsidiary Communications Authorization (see Sections 3.293–3.295) shall not be included in meeting this 36-hour broadcast requirement. In an emergency when, due to causes beyond the control of a licensee, it becomes impossible to continue operation, the station may cease operation for a period not to exceed 10 days provided that the Commission and the Engineer in Charge of the radio district in which the station is located shall be notified in writing immediately after the emergency develops.

SEC. 3.293 *Subsidiary Communications Authorizations.* An FM broadcast licensee or permittee may apply for a Subsidiary Communications Authorization (SCA) to engage in a limited type of non-broadcast service. These services are restricted to those involving programming consisting of news, music, time, weather, and other similar program categories. (The functional music services whereby FM stations undertake to supply programs of a predominantly musical nature to commercial establishments is an example of such an SCA service.) FCC Form 318—Application for Subsidiary Communications Authorization, shall be submitted; the applicant for the SCA shall there specify the particular nature or purposes of the SCA operation or operations sought. New SCA operations will be authorized only for multiplexing. Outstanding Subsidiary Communications Authorizations for simplex operations will not be extended beyond March 1, 1958. SCA operations on a multiplex basis may be carried on without restrictions as to time. Simplex operations pursuant to outstanding authorizations shall be conducted during those times not devoted to the 36 hours required under Section 3.261 for FM broadcast operation.

SEC. 3.294 *Nature of the SCA.* (a) The SCA is of a subsidiary or secondary nature and shall not exist apart from the FM license or permit. No transfer or assignment of it shall be made separate from the FM broadcast license, and failure to transfer the SCA (through application on FCC Form 318) with the FM license or permit renders the SCA void. The licensee or permittee must seek renewal of the SCA (on FCC Form 318) at the same time it applies for its renewal of FM license or permit; failure to renew the latter automatically terminates the SCA.

(b) The grant or renewal of an FM license or permit shall not be furthered or promoted by the proposed or past operation under an SCA; the licensee must establish that his broadcast operation is in the public interest wholly apart from the SCA activities. (Violation of rules applicable to the SCA operation would, of course, reflect on the licensee's qualifications to hold its broadcast license or permit.)

SEC. 3.295 *Operation under the SCA.* (a) The SCA holder must restrict its operation to the uses or purposes granted by the Commission in acting upon his application; prior permission to engage in any additional or new activity must be obtained from the Commission.

(b) Supersonic tones or other similar devices may be employed with respect to material transmitted during the SCA operation in order to promote or maintain its commercial marketability, with the station using appropriate actuating devices with the subscribers' receivers.

(c) In all arrangements entered into under the SCA with outside parties, the licensee or permittee must pass on all material to be transmitted over the station's facilities, with the right to reject any material which it deems inappropriate or undesirable; when the SCA operation is conducted on a simplex basis, the licensee must be able, through appropriate con-

tractual arrangement, to substitute a broadcast program at any time it deems it in the public interest to do so.

(d) The requirements of Sections 3.290 and 3.291 are equally applicable when the FM licensee or permittee is engaged in operations pursuant to the SCA.

(e) The requirements of Section 3.287 with respect to station identification announcements must be met by identification on the main carrier when a station is engaged in SCA operations. The licensee may prevent their reception on subscribers' receivers through the use of supersonic tones capable of deactivating these specialized receivers.

(f) The requirements of Sections 3.288 and 3.289 are applicable to the SCA operation when the latter is conducted on a simplex basis; provided that the station may employ supersonic tones or other devices to prevent the reception of such announcements over subscribers' receivers. The requirement of Section 3.289 shall be deemed to have been met by the SCA operator by the latter's announcement that the program is being transmitted for a fee to commercial subscribers.

(g) The FM licensee or permittee shall maintain logs for the SCA operations. In the program log, the following entries shall be made:

(1) An entry of the time each station identification announcement (call letters and location) is made.

(2) An entry describing the material transmitted in each hour segment. If a speech is made by a political candidate, the name and political affiliations of such speaker shall be entered.

(3) An entry showing that sponsorship and mechanical record announcements, when required under paragraph (f) of this section, have been made, and the time of the latter announcements.

(h) The requirements of Section 3.281(b), (1)–(4), inclusive and (c), and Sections 3.282 to 3.286, inclusive, are equally applicable to logs to be maintained during the SCA operation.

(i) The requirements of Section 3.265 with respect to operators and the provisions of Section 3.274 relating to remote control operation are equally applicable to operation during the SCA period.

(j) The licensee must observe all technical rules and standards applicable to FM broadcast stations when conducting the SCA operation. (For criteria applicable to the multiplex SCA operation, see Section 3.319.)

SEC. 3.319. *Subsidiary communications multiplex operations: engineering standards.* The following standards apply to subsidiary communications multiplex operations under Sections 3.293 to 3.295.

(a) Frequency modulation of subcarrier shall be used.

(b) The instantaneous frequency of the subcarriers shall at all times lie within the range 20 to 75 kilocycles.

(c) The arithmetic sum of the modulation of the main carrier by the subcarriers shall not exceed 30 percent.

Note: Inasmuch as presently approved FM modulation monitors have been designed to meet requirements for modulation frequencies of from 50 to 15,000 cycles, the use of such monitors for reading the modulation percentages during multiplex operation may not be appropriate since the subcarriers utilized are above 20,000 cycles.

(d) The total modulation of the main carrier, including the subcarriers, shall meet the requirements of Section 3.268.

(e) Frequency modulation of the main carrier caused by the subcarrier operation shall, in the frequency range 50 to 15,000 cycles, be at least 60 db. below 100 percent modulation.

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No. [redacted] 67

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Petitioners*,

v.

FUNCTIONAL MUSIC, INC.

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 926

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Petitioners*,

v.

FUNCTIONAL MUSIC, INC.

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

The Solicitor General, on behalf of both the United States and the Federal Communications Commission, has petitioned this Court to issue a writ of certiorari to review the judgment entered on November 7, 1958, by the Court of Appeals for the District of Columbia Circuit. Respondent agrees that certiorari should issue to review this judgment, but it disagrees with petitioner's statement of the issue.

STATEMENT

Respondent is the operator of FM broadcast station WFMF in Chicago. Since 1949, WFMF has carried on a background music subscription service with what is known as a "simplex" transmission system. The regulation of the Commission which was reversed by the Court of Appeals required WFMF to terminate this service unless it installed a "multiplex" transmission system in which the background music would be shifted from the main carrier frequency on which it is now broadcast to an inferior subcarrier which could not be received on ordinary home sets.

The petition for certiorari sets forth the meaning of the terms "simplex" and "multiplex", the general nature of "functional music" operations such as that of WFMF, and a description of the proceedings below (Pet. pp. 2-7). Essentially, WFMF's operation is quite like that of other radio stations. Its primary program fare is music, but this is interspersed with news, religious and educational programs, station identification announcements and some advertising commercials (JA 198, 204, 207-209). Its transmission system is similar to that used by other FM stations; all of its programs can be heard on any ordinary FM set (JA 166, 200).

The essential difference is that most of the station's revenues come from subscribers who want the music programs, without the commercial or other announcements, heard in their offices, restaurants, factories, schools and hospitals. Since these programs can be heard on any FM set, subscribers are induced to pay for the service primarily because, on their sets, a special device which deletes the commercials and other

announcements is installed (JA 80). The result is the same as if a time clock or a boy had been employed by the subscriber to turn the receiver off every time an announcement was to be broadcast. Subscribers whose sets are turned on receive the same programs, at the same time, as the home audience. But subscribers' sets are automatically turned off whenever a commercial or other announcement is broadcast.

As the Court of Appeals recognized, WFMF's music programs have been highly popular with the Chicago home audience.[1] They include orchestral selections of a semi-classical and popular nature (JA 199). While WFMF at one time engaged in "storecasting" (Pet., p. 2), it no longer does so.[2] Its programs, as the Court of Appeals stated, are predominantly background music;[3] and its service is of the general type described in the petition as a "background music" service (Pet. p. 2).

QUESTION PRESENTED

Is a radio station which relies primarily upon revenues from subscribers (as distinguished from advertising sponsors) to support programs intended to be received by all members of the public who will listen (whether in their own homes or in the subscribers'

[1] Pet., App. A, p. 17, note 2: "Surveys conducted in 1955 show WFMF, during the evening hours, to be the most popular FM-only station, and the fifth most popular of all stations, in the Chicago area."

[2] Respondent notified the Commission on January 10, 1959 that the mandatory multiplexing requirement had rendered "completely uncertain" respondent's contract with Storecast Corporation of America for storecast operations (JA 265-266). Since that time, this contract has been terminated.

[3] Pet., App. A, p. 17.

places of business) "broadcasting" in the sense that its programs are "intended to be received by the public" within the meaning of Section 3(o) of the Communications Act?

ARGUMENT

Because an important question of statutory interpretation is presented, respondent does not oppose the issuance of certiorari. The question presented concerns the definition of "broadcasting" in Section 3(o) of the Communications Act which was the "touchstone" of the Commission's decision (JA 108, 132). Section 3(o) defines broadcasting as the "dissemination of radio communications *intended to be received by the public* . . ." (Emphasis added).

The Commission concluded that respondent's station WFMF was not "broadcasting" primarily because most of WFMF's revenues were derived from subscribers rather than advertising sponsors. This interpretation of the statute is important because it was the key to rules affecting a number of FM stations which provide background music to both home audiences and subscribers' establishments. It is also important to the regulation of other subscription services including "pay television". Section 3(o) of the Communications Act has never before been interpreted by this Court.

1. While not opposing certiorari, respondent does oppose petitioner's statement of the issue. The petition states that this case presents an important question concerning the "*power* of the Federal Communications Commission to regulate, by rules of general applicability, the use of the frequency modulation (FM) broadcast band for functional music opera-

tions . . ." (p. 7, emphasis added). No such question was decided by the Court of Appeals.

The issue which was decided below was simply one of statutory interpretation. The Court of Appeals held that the particular statutory basis upon which the Commission had attempted to support a regulation shifting subscription music services from a regular broadcast carrier frequency to a sub-carrier frequency which cannot be received on ordinary sets did not support that regulation. As already indicated, the "touchstone" of the regulation was the Commission's conclusion that the background music programs were not "intended to be received by the public . . .". (JA 132, 108) The Commission conceded that they were intended to be received by the home audience (JA 133, 147). It necessarily concluded that the audience in subscribers' stores and restaurants was not "the public". In essence, what the Commission did was to read the word "primarily" into the Act before the word "intended", and then conclude that respondent's service was not "broadcasting" because it was *primarily* intended for subscribers and therefore was not "*primarily* intended to be received by the public." (JA 133).

It was this interpretaitaon of Section 3(o) which the Court of Appeals rejected. In an opinion by Judge Bazelon (Danaher, J., dissenting), the Court said (Pet., App. A, p. 25):

> "[F]unctional programming can be, and is, of interest to the *general* radio audience. Petitioner, for example, has acquired a high degree of popularity with the Chicago free listening audience. Moreover, it receives substantial and growing revenues from advertisers specifically desiring to

reach that audience. In this light, a finding that the programming of petitioner and broadcasters comparably situated is not directed to, and intended to be received by, the public generally is clearly erroneous. Transmitted with the intent contemplated by § 3(o), such programming therefore has the requisite attributes of broadcasting."

Since the Commisison's decision was based on Section 3(o), the Court's opinion was limited to an interpretation of that section. There are, however, other provisions of the Communications Act upon which regulations applicable to subscription services could be and have been based.[1] The Court of Appeals did

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[1] See, e.g., Section 303 of the Communications Act, 47 U.S.C. § 303:

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

(a) Classify radio stations;

(b) *Prescribe the nature of the service to be rendered by each class of licensed stations* and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

• • • •

(e) *Regulate the kind of apparatus to be used* . . .;

• • • •

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference and to carry out the provisions of this Act: . . .

(g) Study new uses for radio, provide for experimental uses of frequencies and generally encourage the larger and more effective use of radio in the public interest.

• • • •

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . .". (Emphasis added)

The Commission's rules authorizing and regulating the use of broadcast frequencies for subscription television test operations are

not therefore "deprive the Commission of power effectively to regulate" these services as the Government suggests (Pet., p. 12). Indeed, the Court of Appeals' action was much like that of this Court in the first *Chenery* case.[1] As the Court of Appeals stated (Pet., App. A, p. 26):

> "Whether or not petitioner's functional music service may be barred as objectionable for reasons other than its supposed status as a non-broadcasting service is not before us. We merely conclude that the reasons which the Commission relies upon do not support its action in barring functional music. *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194 (1947). . . ."

For these reasons, the Court of Appeals did not deprive the Commission of power to regulate functional music operations.

Nor did the Court of Appeals substitute its judgment for that of the Commission in an area where the Commission's "assessment of technical evidence" and "cumulative experience" were important (See Pet., p. 8). The issue before the lower Court was a simple one of statutory interpretation: whether an intention to serve subscribers changed a service admittedly intended for the public from "broadcasting" under Sec-

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keyed particularly to the italicized statutory language quoted above rather than to Section 3 (a). The Commission specifically held that it had power to authorize and regulate subscription television transmissions *whether or not* such transmissions constituted "broadcasting". *First Report on Subscription Television*, 23 FCC 531, 536, 540 (1957).

[1] *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194.

tion 3(o) to something else. No technical expertise was necessary to decide this question. Therefore, as this Court has said, since "the Commission professed to dispose of the case merely upon its view of a principle which it derived from the statute and did not base its conclusion on matters within its own special competence, it is for us to determine what the governing principle is." *Federal Communications Commission* v. *RCA Communications*, 346 U.S. 86, 91.

2. Although the Court of Appeals' decision did not deprive the Commission of power to regulate functional music operations, it did remove the statutory foundation on which the Commission had erroneously based the mandatory multiplexing rule. This rule would have caused the termination of the subscription services carried on by respondent and others similarly situated, and deprived the public of music programs which have become highly popular in Chicago and many other cities. The reason for this popularity was well expressed by an unsolicited letter from WFMF's home audience (JA 22):

> "[T]he uniform excellence of your musical selections is indeed balm to ears coarsened by too many years of listening to assorted hucksters extolling the virtues of various and sundry soaps, cold remedies and what have you."

The Court of Appeals' decision is important because it permits the home audience to continue hearing services such as that of WFMF on ordinary sets without charge.

3. While the Court of Appeals' conclusion that background music stations are engaged in "broadcasting" does not deprive the Commission of *power* to regulate

such stations, it is of importance to the *manner* in which they are regulated, and to the potential growth of other subscription radio and television stations. The fact that background music stations derive a large portion of their revenues from subscribers was the key to the Commission's decision that they were not engaged in broadcasting.[1] For this reason, the Court of Appeals' decision in this case will be an important precedent when the Commission decides the question which has not yet been authoritatively resolved—whether subscription radio and television are "broadcasting" within the meaning of Section 3(o).[2]

A review by this Court of the issue of statutory interpretation decided by the Court of Appeals would present an opportunity for a determination that the medium of broadcasting need not continue to be the

[1] The Commission based its conclusion that functional music stations were not "broadcasting" on three practices which it said these stations engage in. As described by the Court of Appeals, these practices were "presentation of a highly specialized program format, deletion of advertising from subscribers' receivers, and exaction of a charge for these services" [Pet., App. A, p. 24]. Each of these practices was said by the Commission to illustrate the fact that functional music stations were geared primarily to serve subscribers (rather than advertisers) and therefore were not "broadcasting". (JA 109, 132-133) The Commission stated, for example, that "as demonstrated by the format adopted and apparently the station's source of revenues" service to subscribers was "the key to the overall operation." (JA 133; see also JA 109) It is thus clear that the fundamental difference which the Commission found to exist between functional music stations and other stations was the primary reliance of functional music stations on revenues from subscribers rather than from advertising sponsors.

[2] See *First Report on Subscription Television*, 23 FCC 531, 538, 540-542 (1957); *Subscription Television*, Hearings before the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., pp. 2-6, 8, 13, 15, 19-20, 27-28, 183-185 (1958).

captive of advertising sponsors but is free to seek support from other sources.

CONCLUSION

For these reasons, certiorari should be granted to consider the issue of statutory interpretation decided by the Court of Appeals.

Respectfully submitted,

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